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No. 85-182

In the Supreme Court of the United States

October Term, 1985

NORTHWEST CENTRAL PIPELINE CORPORATION and K N ENERGY, INC.,
Appellants,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

BRIEF IN RESPONSE TO THE BRIEF OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

Whether the orders of the Kansas Corporation Commission amending the Basic Proration Order for the Hugoton Gas Field impermissibly interfere with federal regulatory jurisdiction over interstate pipelines.

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At the invitation of the Court, the Solicitor General and the Federal Energy Regulatory Commission filed a brief expressing the views of the United States on the issues raised in this appeal. The Kansas Corporation Commission (Kansas Commission) submits this brief to respond to certain points raised in the Solicitor General's brief.

STATEMENT

This appeal involves orders of the Kansas Commission which altered the way that gas may be produced from the Hugoton Gas Field. The documents previously filed in this cause accurately summarize the way in which underage (unproduced allowable) is cancelled and how this underage must be reinstated and produced within an eight year time period before it is permanently cancelled. The issue before this Court is whether these orders, directed to gas producers, have an indirect effect on interstate pipeline purchasers that impinges upon federal jurisdiction.

ARGUMENT

The brief filed by the Solicitor General addresses two issues that merit further discussion. First, whether the orders of the Kansas Commission impermissibly interfere with the scheme of federal jurisdiction over interstate pipelines. Second, whether this Court's recent decision in the *Transco* case is applicable to the instant appeal. We respectfully submit that the answer to either inquiry is no.

1. The appellants contend that the orders amending the production tolerance provisions of the Basic Proration Order for the Hugoton Gas Field constitute an improper pre-emption of federal authority. Their argument, as properly summarized by the Solicitor General, is that the contract dedication of this gas to the interstate market prevents a state from permanently cancelling any allowable that is not produced within certain time periods (Brief of Amici Curiae at 9). If this argument is correct, then many conservation regulations which direct how gas

may be produced from wells connected to the interstate pipeline system are void.

Prior to the 1983 amendments, cancelled underage could accumulate indefinitely and the pipeline purchasers could postpone taking gas from wells indefinitely without an adverse regulatory effect. At that time there were gas wells in the field which were overproduced and wells which were underproduced and accumulating cancelled underage. Expert testimony presented to the Kansas Commission indicated that this disparity was likely to cause drainage away from the underproduced wells if not remedied. The expert witnesses unanimously agreed that the only true remedy to uncompensated drainage was the production of allowable pursuant to the deliverability formula used to regulate gas production from the Hugoton Field. To effect this remedy, the Kansas Commission tightened the tolerance provisions of the basic proration order to require that underage would be reinstated and produced within eight years after it is cancelled. The appellants complain that this adjustment and its possible effect on their purchasing practices is an impermissible preemption of federal authority.

The Solicitor General quite properly states that the appellants have too narrowly construed the production and gathering exemption of the Natural Gas Act, 15 U.S.C. §717 (b) (Brief of Amici Curiae at 7, footnote 6). The cases cited by the Solicitor General provide that the states' authority under this exemption permits regulations directed at gas producers which further a legitimate conservation concern. See *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937). Regulations imposed upon producers which restrict production to a certain percent of a well's open flow, require allowable to be pro-

duced within a given time, or affect the quantity of gas that may be produced in any way inherently have an effect on connected interstate pipelines. These types of regulations, including the orders before this Court, are a proper exercise of state authority over production and gathering.

On December 12th and 13th, 1985, hearings were held by the Kansas Commission to determine whether permanent cancellation of underage scheduled to occur on December 31, 1985, should be delayed. The Kansas Commission ordered that such permanent cancellation be forestalled until September 30, 1987, to give producers additional time to reinstate cancelled underage. The history of the Basic Proration Order for the Hugoton Field has been one of continual adjustments to meet changed circumstances in geological or market conditions. Such changes have an inherent impact upon connected interstate pipelines. The Kansas Commission submits that this indirect effect does not improperly interfere with the federal scheme.

2. The Solicitor General concludes the discussion of this appeal by urging the Court to apply its decision in *Transcontinental Gas Pipe Line Corporation v. State Oil and Gas Board of Mississippi,* No. 84-1076 (filed January 22, 1986), to this case. The Kansas Commission believes the *Transco* case, like *Northern Natural Gas Co. v. State Corporation Commission,* 372 U.S. 84 (1963), is factually distinguishable and inapplicable to this matter. The Solicitor General correctly states that *Transco* and *Northern Natural* involved state action directed at interstate pipelines comprehensively subject to federal regulation (Amici Curiae Brief at 13, footnote 10). The orders at issue in this appeal place no affirmative burden on any interstate

pipeline as was the case in *Transco*. The orders at issue in this appeal do not frustrate the goals of the Natural Gas Policy Act of 1978, 15 U.S.C. §3301, *et seq.*, as summarized by this Court in *Transco*, and fall within the production and gathering exemption of the Natural Gas Act.

The Solicitor General suggests that the record in this appeal lacks findings by the Kansas Commission or state courts as to the effect of the orders on the pipelines and that the case should be remanded for further such findings (Amici Curiae Brief at 12-13). The Kansas Commission submits that the reason for the lack of such findings is that the effect of the rule on the pipelines is not substantial. At the 1982 hearings, no evidence was presented that would suggest that the change would exacerbate the pipelines' take-or-pay problems with producers in other fields or have any adverse effects on their contract relationships, unlike the situations in *Northern* or *Transco*. The Kansas Commission respectfully submits that further hearings on this issue will not produce additional findings that would raise a substantial federal question.

CONCLUSION

The orders of the Kansas Commission were a proper exercise of state authority over the production of natural gas. The decision of the Kansas Supreme Court was correct and should be affirmed by this Court.

Respectfully submitted,

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